Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE WHARF (HOLDINGS) LIMITED, a Hong Kong company; WHARF COMMUNICATIONS INVESTMENTS LIMITED, a Hong Kong company; and STEPHEN NG, a Hong Kong citizen,

Petitioners,

v.

UNITED INTERNATIONAL HOLDINGS, INC., a Delaware corporation; and UIH ASIA INVESTMENT CO., a Colorado general partnership,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that Section 10(b) of the Securities Exchange Act of 1934 and S.E.C. Rule 10b-5 apply to disputes over the ownership of securities where there is no claim that financial information was misrepresented or not disclosed?

2. Whether the Court of Appeals erred in holding that Section 10(b) and Rule 10b-5 apply where plaintiffs' only claim seeks damages for nonperformance of an alleged unenforceable oral option?

3. Whether the Court of Appeals erred in disregarding the parties' choice of Hong Kong law?

4. Whether the Court of Appeals erred in holding that a district court which lacked subject matter jurisdiction under 28 U.S.C. § 1331 could nonetheless exercise supplemental jurisdiction over state law claims?

5. Whether the Court of Appeals erred in upholding compensatory and punitive damage awards totaling $125,500,000 where plaintiffs offered no proof of damages in excess of $900,000 and the punitive damage award was more than 65 times plaintiffs' economic loss?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT IN ACCORDANCE WITH RULE 29.6 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

The petitioners are The Wharf (Holdings) Limited, a Hong Kong company, Wharf Communications Investments Limited, a Hong Kong company, and Stephen Ng, a Hong Kong citizen, who were defendants-appellants below and shall be referred to as "petitioners", "defendants", or "Wharf" throughout this petition. Wharf Communications Investments Limited is wholly owned by The Wharf (Holdings) Limited. More than 10% of the stock in The Wharf (Holdings) Limited is owned by Wheelock & Co. Limited, a Hong Kong company.

The respondents are United International Holdings, Inc., a Delaware Corporation, and UIH Asia Investment Company, a Colorado general partnership, based in Hong Kong, who were plaintiffs-appellees below and shall be referred to as "respondents", "plaintiffs", or "UIH" throughout this petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, The Wharf (Holdings) Limited, Wharf Communications Investments Limited, and Stephen Ng (hereinafter "Wharf") respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on April 28, 2000.

CITATION TO OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 210 F.3d 1207 (10th Cir. 2000) and annexed hereto as Appendix B. This Decision affirmed the Judgment of the United States District Court for the District of Colorado filed on May 22,

1997, the Order of October 23, 1997, confirming the Order/Recommendation of September 25, 1997 of United States Magistrate Judge Bruce D. Pringle, and the Order of the Court dated October 23, 1997 denying Defendants' motion pursuant to Fed. R. Civ. P. 50 and 59 and Colorado Revised Statute § 13-21-102. These final orders and judgments of the District Court are not officially reported but are annexed hereto as Appendices C, D and E.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on April 28, 2000. Petitioners' petition to the Court of Appeals for the Tenth Circuit for rehearing with suggestion for rehearing *en banc* was denied on June 8, 2000; that order is annexed hereto as Appendix F. This petition is timely filed within ninety days of the denial of the petition for rehearing and suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

A primary question presented in this case is whether Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b) and S.E.C. Rule 10b-5 (17 C.F.R. § 240.10b-5) extends to disputes over parties' claims of right to purchase corporate securities. The relevant statutes are set out in Appendices G and H.

STATEMENT OF THE CASE

Introduction

Wharf seeks review of a judgment of $153,708,440 which has as its sole basis a single oral utterance and an economic loss of no more than $900,000. That judgment was, at the time entered, the largest ever awarded in the United States District Court for the District of Colorado — a judgment totaling $153,708,440, including $58,500,000 in punitive damages. The basis for that $153,708,440 judgment was plaintiffs' hotly

disputed claim that a representative of Wharf once orally stated that Wharf would grant plaintiffs an option to purchase, for an exercise price of $50,000,000, 10% of the stock in a then nonexistent cable television system which was to be organized by defendants in Hong Kong ("Wharf Cable"). Plaintiffs paid nothing for the alleged oral option. Plaintiffs did not exercise the alleged oral option. Plaintiffs never invested any money in Wharf Cable.

The alleged oral option was never evidenced by any writing or even referred to in any contemporaneous document. Plaintiffs first claimed that they had been granted an option in their complaint which was filed many months after negotiations had been terminated. The documentary history of the parties' negotiations is flatly inconsistent with the alleged option. That history clearly established that the parties intended to proceed from an expressly nonbinding letter of intent to a formal, written stock purchase agreement — not an option. No agreement was ever completed, approved or executed by the parties.

Plaintiffs offered *no* evidence at trial of the *value of their alleged oral option* to buy 10% of the stock of Wharf Cable for $50,000,000±. Plaintiffs' expert testified only to *the value of 10% of the stock* of Wharf Cable, which he claimed to be $67,000,000. Plaintiffs deliberately misrepresented that testimony to be a valuation of their alleged option, even though that option was worth approximately $50,000,000 less than the stock itself, by reason of the $50,000,000 exercise price they would have had to pay to purchase the stock. The only economic loss allegedly sustained by plaintiffs was approximately $900,000 in reliance expenditures incurred in the course of plaintiffs' efforts to position themselves to acquire an equity position in Wharf Cable. The jury was misled into awarding plaintiffs $67,000,000 in compensatory damages and $58,500,000 in punitive damages by plaintiffs' deliberate misrepresentation of their expert's testimony. Since punitive damages cannot exceed compensatory damages under Colorado law, plaintiffs' misrepresentation resulted in more than

$100,000,000 in erroneous damages and punitive damages which were 65 times plaintiffs' only economic loss.

The liability judgment entered below was precluded by numerous rules of applicable law which a panel of the Tenth Circuit ("Panel") simply refused to apply. Since plaintiffs' sole allegation was that Wharf had misrepresented its intention to perform an asserted contractual duty to sell securities, their claims cannot constitute a violation of Section 10(b) of the Securities Exchange Act of 1934, as a matter of law, because disputes over parties' claims of right to purchase securities do not constitute violations of Section 10(b) (15 U.S.C. § 78j(b)) or S.E.C. Rule 10b-5 (17 C.F.R. § 240.10b-5). Since plaintiffs' oral option claim was unenforceable under the Uniform Statute of Frauds, as adopted by Colorado, plaintiffs did not have an enforceable contractual right to purchase securities, required to assert a Section 10(b) claim under this Court's decisions in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) and *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977). (*See* pp. 16 to 19, *infra*.)

The Statute of Frauds barred *all* of plaintiffs' state law claims for breach of contract, fraud, negligent misrepresentation, breach of fiduciary duty and state securities act violations. (*See* p. 19-21, *infra*.) Plaintiffs' state tort claims were also barred by the economic loss doctrine. (*See* pp. 13-14, *infra*.)

Since five of the six parties to the litigation were resident in Hong Kong, since most of the negotiations took place in Hong Kong, since any work to be performed by plaintiffs under the stock purchase agreement being negotiated was to be performed in Hong Kong, and since the parties clearly intended Hong Kong law to apply, the federal securities laws were never applicable to the parties' relationship. Because there was no diversity jurisdiction[1] and the absence of "arising under"

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[1] Certain partners in the plaintiff partnership were Hong Kong residents, as were defendants.

jurisdiction (28 U.S.C. § 1331) was obvious from inception, the district court should have dismissed the entire case at the outset.

This Petition, however, is not concerned with mere jurisdictional issues. Since there is no viable theory of liability which can support plaintiffs' compensatory damage judgment of $67,000,000, and since plaintiffs proved only $900,000 in alleged economic loss, as set forth below, plaintiffs' entire $153,708,440 judgment is barred by applicable law and Wharf seeks its vacatur.

The punitive damage award of $58,500,000, itself, violates the constitutional limitations laid down by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Plaintiffs failed to introduce any evidence of the value of their alleged oral option to purchase 10% of the stock of Wharf Cable for $50,000,000±. The only evidence of damages presented was plaintiffs' expert's opinion as to the value of 10% of the stock of Wharf Cable — an estimate which was $50,000,000 greater than the value of the option by virtue of the $50,000,000 exercise price which plaintiffs would have to pay to purchase the stock. The only economic loss sustained by plaintiffs was $900,000 in alleged reliance expenditures. The jury's award of $58,500,000 in punitive damages was, therefore, more than 65 times the only real economic loss sustained by plaintiffs. (*cf. BMW of North America v. Gore*, *supra*, in which this Court struck down as excessive a punitive damage award which was 35 times the relevant in-state injury.)

The end result of the proceedings below has been a grotesque miscarriage of justice in which the largest judgment ever awarded in Colorado has been uncritically affirmed despite the fact that liability is clearly barred by applicable law and the damage award is both the result of undeniable misrepresentation and a violation of *Gore*. Despite all of that, the Panel resolved every one of the numerous issues described below—without exception—against Wharf in a series of legal rulings, some of which are clearly wrong, others of dubious validity and still others which conflict with the decisions consistently reached by

other Circuit Courts in numerous indistinguishable cases. The result is that this Court is now confronted with a judgment of $153,708,440 which has as its sole basis a single oral utterance and an economic loss of no more than $900,000.

District Court Proceedings

This petition arises from a decision of a panel of the United States Court of Appeals for the Tenth Circuit affirming a district court judgment for compensatory damages of $67,000,000, punitive damages of $58,500,000, and prejudgment interest of $28,208,440 (*see* P.App., E-2-4) — all for a breach of an alleged oral statement granting plaintiffs an option to purchase a 10% stock interest for $50,000,000± in a newly organized Hong Kong cable television business.

All of plaintiffs' claims were based on a single oral statement allegedly made by a representative of Wharf, Mr. Stephen Ng, on October 8, 1992, offering plaintiffs an option to purchase 10% of the stock of Wharf Cable for $50,000,000±. Plaintiffs paid nothing for the alleged option. Plaintiffs never exercised the alleged option or invested any money in Wharf Cable. Plaintiffs made no claim that defendants made any misrepresentations relating to the value of Wharf Cable. Over defendants' objections, plaintiffs were allowed to transform their breach of contract allegation into claims of violation of Section 10(b), Rule 10b-5, and state law claims of securities law violations, fraud, breach of fiduciary duty and negligent misrepresentation.

Plaintiffs' only proven economic interest in the transaction consisted of approximately $900,000 in expenditures plaintiffs claimed to have made in reliance on the alleged oral statement. Plaintiffs also claimed to have lost $67,000,000 in profits they assert they would have made from a 10% investment in Wharf Cable if they had made such an investment. However, plaintiffs' damages expert offered evidence *only* of the value of a *10% stock interest* in Wharf Cable. Plaintiffs offered *no evidence* of the value of the interest of which they were allegedly

deprived—an oral *option* to purchase 10% of the stock of Wharf Cable for $50,000,000±. Plaintiffs, deliberately, misrepresented their expert's valuation of a *10% stock interest* to the jury as a valuation of an *option* to acquire a 10% stock interest for $50,000,000±.

Deceived by plaintiffs, the district court awarded plaintiffs compensatory damages of $67,000,000, punitive damages of $58,500,000 and prejudgment interest of $28,204,440—a total of $153,708,440—all arising from a single alleged oral utterance and an economic loss of $900,000 in alleged reliance expenditures. (P.App. E-2-4.)

Statement of Facts

Plaintiffs in this case are a Denver-based cable consulting company, United International Holdings, Inc. and an affiliated partnership with partners resident in Hong Kong ("UIH"). Defendants are a long-established Hong Kong investment and operating company, The Wharf (Holdings) Limited, Wharf Communications Investments Limited, a Hong Kong subsidiary of Wharf Holdings, and Stephen Ng, an officer of the Wharf companies (collectively "Wharf").

In May of 1992, Wharf was informed that the Hong Kong government would entertain bids for a cable system to serve Hong Kong. Wharf submitted its bid to operate the franchise on September 30, 1992. The Hong Kong government awarded the cable franchise to Wharf on June 1, 1993. Wharf launched the Hong Kong cable service on October 31, 1993. (P.App. Y-2; AA-2; AH-2.)

During June 1992, Wharf entered into discussions with plaintiff UIH and with NYNEX (not a party to this suit) about selling stock interests to UIH and NYNEX in Wharf Cable at a price to each equal to its aliquot ownership share of the equity capital of Wharf Cable, which was expected to total $500,000,000±. (P.App. Z-2-3; AB-1-3; AJ-1-2; AK-1-3.) In the case of UIH, Wharf discussed selling a 10% stockholding for $50,000,000±.

Wharf, NYNEX and UIH negotiated successive drafts of a letter of intent and a stock purchase agreement between August and November 1992. (P.App. O-1-7; P-1-9; AL-1-2; AN-1; AO-1-2; AP-1-2; AQ-1-2.) Throughout this period, Wharf, UIH and NYNEX all understood that negotiations would proceed by the parties negotiating and signing an expressly nonbinding letter of intent, to be followed by a formal, written 50-page stock purchase agreement, to be formally executed by authorized officers, if and when agreement was reached and approved by their boards of directors. No agreement was reached, authorized or executed.

All drafts of both documents contemplated a *stock purchase agreement* — not an option. All drafts of the letter of intent stated, "*This letter does not create legally binding and enforceable obligations*", and provided that Wharf, NYNEX and UIH would not be legally bound unless and until they agreed to and executed a "*formal, legally binding shareholders' agreement between them*". (*See, e.g.*, P.App. O-1, 7.) The shareholders' or stock purchase agreement went through four drafts in the fall of 1992, dated September 16, October 26, November 4, and November 9, 1992 (P.App. S-1; T-1; AC-3-4; AD-2-3; AM-1-2; AR-1.) — before and after the alleged October 8, 1992 conversation. Each draft was a *stock purchase agreement*, which, if executed, would have obligated UIH to purchase the stock of Wharf Cable, and was, therefore, flatly inconsistent with Wharf's later claim that it had entered into an *oral option* agreement. Each draft stock purchase agreement elected Hong Kong law: "This Agreement shall be governed by and construed in accordance with the laws of Hong Kong and the parties hereto irrevocably submit to the nonexclusive jurisdiction of the Hong Kong court." (P.App. Q-2; S-3; T-3; U-3.)

These negotiations did not result in any agreement and none was ever signed. NYNEX dropped out in December 1992 and Mr. Ng promptly (in January 1993) told Mr. Schneider of UIH orally and in writing: "given the NYNEX situation, we

should put ownership issues on hold until after service launch". (P.App. AT-1.) That documentary history conclusively proves that as of January 1993, no agreement had been reached. The parties had "*put ownership [by plaintiffs of Wharf Cable's common stock] on hold until after service launch", i.e. October 31, 1993*. Between August 1992 and January 1993, UIH had performed certain tasks to support Wharf's cable efforts and to position itself as a potential investor in the cable system attractive to Wharf, which efforts UIH valued at no more than $900,000. This was the only evidence offered by plaintiffs of the economic loss sustained by them as a result of the loss of their alleged option.

In April 1993, UIH attempted to reopen negotiations. Writing on behalf of UIH, Mr. Fries said: "*We left the issue of UIH's ownership in Stephen's [Mr. Ng of Wharf] hands*" (P.App. AU-1), and sent a draft memorandum of understanding ("MOU") (P.App. V-1-10). Mr. Fries thereby admitted that the question of any stock ownership by UIH had been left undecided and at Mr. Ng's discretion. That draft MOU again set forth a stock purchase agreement — not an option — and was "conditioned upon . . . approval by both UIH and Wharf". (P.App. V-3.) No agreement was ever reached.

Many months later in November 1994, UIH sued Wharf for: violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5; breach of contract; state securities violations; fraud; negligent misrepresentation; and breach of fiduciary duty. In its November 1994 complaint, UIH claimed for the first time that there was a conversation between Mr. Ng of Wharf and Messrs. Schneider and Elsner of UIH on October 8, 1992 during which Mr. Ng orally offered UIH an option to buy 10% of the stock of Wharf Cable for $50,000,000±. UIH's *only claim of wrongful conduct* in this case was that Wharf had misrepresented its intention to sell UIH 10% of the stock of Wharf Cable for $50,000,000±. UIH made no claim that Wharf had made any actionable misrepresentations independent of Wharf's alleged undertaking to sell UIH 10% of

the stock of Wharf Cable for $50,000,000±. Most importantly, UIH made no claim that Wharf had made any misrepresentations of value concerning Wharf Cable, or any other entity, in its discussions with UIH.

UIH's damage evidence was based on the testimony of its expert, Jones. Mr. Jones' report, (P.App. X), consisted of a conventional discounted cash flow study of *the value of a 10% stock interest* in Wharf Cable, which he valued at $67,000,000 (P.App. X; AE-2; AF-3-4). Mr. Jones *did not value UIH's alleged oral option* to buy 10% of the stock of Wharf Cable for UIH's proposed aliquot share of Wharf Cable's equity capital, estimated to be $50,000,000±. That was a crucial failure of evidence. That failure was not inadvertent. It was deliberate. Plaintiffs' counsel deliberately cut off their questioning of Mr. Jones just as it would have revealed that he had not deducted the $50,000,000 exercise price in his valuation. (P.App. AG-2.) In closing, plaintiffs' counsel proceeded to intentionally misrepresent Mr. Jones' testimony as to the value of 10% of the stock of Wharf Cable as a valuation of an alleged option to acquire that stock for $50,000,000±. (P.App. AI-3-4.)

The jury accepted UIH's misrepresentation over Wharf's objections and awarded $67,000,000 in "compensatory" damages, $58,500,000 in punitive damages, and prejudgment interest of $28,208,400 — a total of $153,708,400 — all to compensate plaintiffs for reliance expenditures which plaintiffs, themselves, valued at no more than $900,000. (P.App. E-2-4.)

Tenth Circuit Opinion

Wharf sought relief from what it perceived to be a gross miscarriage of justice by appeal to the Court of Appeals for the Tenth Circuit. Wharf argued that the district court had no subject matter jurisdiction because Section 10(b) and Rule 10b-5 did not apply to disputes over the ownership of

securities, such as UIH's oral option claim.[2] The Panel held that Section 10(b) does apply to disputes over the ownership of securities, in conflict with the Third, Fourth, Seventh and Ninth Circuits. *Gurwara v. LyphoMed, Inc.*, 937 F.2d 380 (7th Cir. 1991); *Stanford v. Humphrey*, No. 88-3997, 1990 WL 4659 (9th Cir. Jan. 25, 1990) (unpub.); *Hunt v. Robinson*, 852 F.2d 786 (4th Cir. 1988); *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187 (3d Cir. 1976).

Wharf argued further that UIH had no Section 10(b) claim because UIH had no right to purchase a security enforceable under state law since the Statute of Frauds, Colo. Rev. Stat. § 4-8-319 (P.App. I-2), rendered oral agreements to purchase securities unenforceable. The Panel held that Section 10(b) and Rule 10b-5 did apply, even though plaintiffs held no right to purchase securities enforceable under state law, in conflict with the Seventh and Eleventh Circuits. (210 F.3d at 1221-2; P.App. B-15-18.) *See Kagan v. Edison Bros. Stores, Inc.*, 907 F.2d 690, 691 (7th Cir. 1990); *Pelletier v. Stuart-James Co.*, 863 F.2d 1550, 1555-56 (11th Cir. 1989). In reaching that conclusion, the Panel ruled (1) that UIH's oral option allegation, itself, *was a security* for purposes of the securities laws (210 F.3d at 1221; P.App. B-15); (2) but that UIH's alleged oral option *was not a security* for purposes of the statute of frauds (210 F.3d at 1225; P.App. B-23); and (3) that the statute of frauds barring oral agreements for the purchase of securities did not apply to oral options to purchase securities (*id*); and (4) that the district court's boilerplate contract consideration instruction was logically equivalent to a statute of frauds/partial performance instruction (210 F.3d at 1225-6; P.App. B-24-25).

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[2] One of the plaintiffs in the district court was an affiliated partnership with Hong Kong resident partners. That meant that the district court's subject matter jurisdiction turned on plaintiffs' Section 10(b) allegation and 28 U.S.C. § 1331.

Wharf argued that the district court had no "arising under" jurisdiction under 28 U.S.C. § 1331 since Hong Kong law applied to the parties' relations, not the federal securities laws, because: (1) five of the six parties, including one of plaintiffs, were resident in Hong Kong; (2) Wharf Cable was to be in Hong Kong; (3) virtually all of the negotiations were in Hong Kong; (4) any services to be rendered by UIH pursuant to the stock purchase agreement being negotiated were to be rendered in Hong Kong; and (5) every document which addressed the choice of law issue and the admissions of several UIH officers proved that all parties had intended to apply Hong Kong law.

The Panel rejected Wharf's position, arguing that: (1) no choice of law decision need be made at all because Wharf had allegedly failed to show that there was any material substantive difference between the securities laws of Hong Kong and those of the United States, even though the district court's subject matter jurisdiction obviously depended upon the choice of law question (210 F.3d at 1222-3; P.App. B-18-21); and (2) Wharf had failed to establish that the parties' choice of Hong Kong law was set forth in an enforceable *written* contract (*id*), even though that newly invented "requirement" could not be reasonably applied to a case where plaintiffs' entire claim was based on an alleged *oral* agreement.

Wharf sought dismissal of UIH's state claims on the ground that a district court cannot exercise supplemental jurisdiction where the court lacks subject matter jurisdiction and the failure of jurisdiction can be established, as a matter of law, on a motion to dismiss under Fed. R. Civ. P. 12(b)(1) or (6). The Panel ruled that a district court could assert supplemental jurisdiction even though plaintiffs' complaint failed to assert a claim arising under U.S. law, so long as the federal claim was not, in the Panel's unacceptably subjective view, "frivolous", (210 F.3d at 1220; P.App. B-13), in conflict with the Sixth and Federal Circuits. *Textile Prods., Inc. v. Mead Corp.*, 134 F.3d

1481, 1486 (Fed. Cir. 1998); *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1255 (6th Cir. 1996).

Wharf sought dismissal of *all of UIH's claims* because the Statute of Frauds, Colo. Rev. Stat. § 4-8-319, made oral agreements to purchase securities unenforceable and the absence of an enforceable right to purchase securities defeated UIH's tort, as well as its contract claims. (*See* pp. 18-21, *infra*) The Panel offered two arguments for rejecting Wharf's position. *First*, the Panel erroneously ruled that the Statute of Frauds making oral agreements for the purchase of securities unenforceable did not apply because the oral option alleged by UIH was not a "security" within the statute of frauds. (210 F.3d at 1225; P.App. B-23-24.) By mistakenly applying the statutory term "security" to UIH's alleged oral option, rather than the common stock of Wharf Cable which UIH alleged the right to purchase (and which clearly was a "security"), the Panel rendered Colo. Rev. Stat. § 4-8-319 inapplicable to the only class of alleged agreements it was intended to bar, *i.e.*, oral agreements, such as UIH's oral option, to buy securities. *Second*, the Panel proceeded to excuse the district court's failure to instruct the jury on the Statute of Frauds,[3] (210 F.3d at 1225-6; P.App. B-24-25), ruling that the court's instruction on contract consideration was sufficient, even though there is no rational basis for any conclusion that the consideration instruction subsumed the elements of a Statute of Frauds/partial performance instruction.

Wharf argued that the economic loss doctrine, which has been accepted by the Colorado courts, bars any tort claim

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[3] Wharf's statute of frauds objection to plaintiffs' alleged oral option raised questions of fact which had to be submitted to a jury pursuant to binding precedent from the Colorado Supreme Court and the Tenth Circuit. *See Lobato v. Bleidt*, Nos. 94-1264, 94-1275, 1995 WL 307609, at *1 (10th Cir. May 11, 1995) ("whether part performance of an oral contract is substantial enough to take the contract out of the statute of frauds is . . . a factual question"); *Nelson v. Elway*, 908 P.2d 102, 108-09 (Colo. 1995) (en banc).

where a plaintiff seeks damages for economic loss based on a claim that defendant fraudulently misrepresented its intention to perform a contractual obligation. The Panel held that the economic loss doctrine does not apply to intentional torts, in conflict with the Sixth, Seventh, Eighth and Eleventh Circuits. (210 F.3d at 1226-7; P.App. B-25-28.) *See Dinsmore Instrument Co. v. Bombardier, Inc.*, 199 F.3d 318, 320 (6th Cir. 1999); *AKA Distrib. Co. v. Whirlpool Corp.*, 137 F.3d 1083, 1086-7 (8th Cir. 1998); *Cooper Power Sys., Inc. v. Union Carbide Chemicals & Plastics Co., Inc.*, 123 F.3d 675, 682 (7th Cir. 1997); *Hoseline, Inc. v. U.S.A. Diversified Prods., Inc.*, 40 F.3d 1198, 1199-1200 (11th Cir. 1994).

Wharf sought reversal of the district court judgment because the entire documentary history of the transaction conclusively proved that Wharf and UIH both understood that the process of negotiation would proceed from an expressly nonbinding letter of intent to a final, written stock purchase agreement which would become binding only upon approval by the parties' boards of directors and formal execution, neither of which events ever occurred. The Panel ignored the conclusive documentary record of the parties' negotiations, in conflict with decisions of the Second Circuit and an earlier decision of the Tenth Circuit. *Winston v. Mediafare Entertainment Corp.*, 777 F.2d 78, 80-81 (2d Cir. 1986); *Reprosystem B.V. v. SCM Corp.*, 727 F.2d 257, 261-62 (2d Cir. 1984); *Aircraft Sales of California, Inc. v. Insured Aircraft Title Serv., Inc.*, No. 90-6125, 1991 WL 27410 (10th Cir. Dec. 18, 1991) (unpub.).

Wharf sought vacatur of the compensatory damages judgment because UIH offered no evidence of the value of UIH's alleged *option* to acquire 10% of the stock of Wharf Cable for $50,000,000±. Instead, UIH's expert offered only evidence of the value of a *10% stock interest* in Wharf Cable, which he estimated to be $67,000,000. (P.App. X; AE-2; AF-3-4.)

UIH brazenly misrepresented that testimony to be a valuation of UIH's alleged option even though that option was

worth some $50,000,000 less because UIH was obligated to pay an exercise price of $50,000,000 to buy its 10% stock interest. (P.App. AI-3-4.) The jury was deceived by UIH's misrepresentation and awarded "compensatory" damages of $67,000,000. The jury compounded this error by awarding punitive damages of $58,500,000. Because punitive damages cannot exceed compensatory damages under Colorado law, UIH's successful misrepresentation caused an error in excess of $100,000,000 in the judgment below. *See* Colo. Rev. Stat. § 13-21-102(1)(a).

The Panel affirmed the district court's award despite this egregious $100,000,000 error. The Panel did so because it found that UIH's expert had "considered" capital costs in valuing 10% of the stock of Wharf Cable. (210 F.3d at 1229; P.App. B-39.) In fact, plaintiffs' expert performed a conventional discounted cash flow ("DCF") analysis of the value of the stock of Wharf Cable. In performing DCF valuations, all costs — current and capital — are deducted from all revenues. The fact that plaintiffs' expert considered capital costs, therefore, does *not* transform his valuation of a *10% stock interest* into a valuation of an *option* to buy that 10% stock interest for $50,000,000.

Wharf sought appellate relief from the district court's award of $58,500,000 in punitive damages because the only evidence advanced by plaintiffs to prove the economic loss sustained as a result of defendants' breach of the alleged option amounted to no more than $900,000 in alleged reliance expenditures. Punitive damages in this case were, therefore, 65 times plaintiffs' only proven compensatory damages. The punitive damages award in *BMW of North America v. Gore*, *supra*, was by contrast only 35 times the relevant in-state economic loss. 517 U.S. 559, 582 n.35 (1996). In a case involving only economic loss arising from a single alleged oral statement, such punitive damages could not conceivably be justified.

Wharf respectfully submits that the end result in this case is, to date, an egregious miscarriage of justice. With post-judgment interest, the total liability in this case exceeds $190,000,000. That liability includes a "compensatory" damage award of $67,000,000 based on demonstrable and undeniable misrepresentations by UIH which inflated the damage award by at least $50,000,000. That liability includes a punitive damage award of $58,500,000 in a case where defendants are accused of a single allegedly false promissory utterance and plaintiffs' economic loss is no more than $900,000.

This case comes to this Court from an appellate decision which is riddled with so many demonstrable errors, so many conflicts with other Courts of Appeal and so many questionable judgments, each of which resolved the complex issues here described—without exception and often without justification—against defendants, that it constitutes an abdication of appellate responsibility. Given the enormity of the judgment below and the flawed judicial process which has led to it, considerations of fundamental fairness support the granting of certiorari so that this Court can more carefully examine the extremely serious issues raised herein.

REASONS FOR GRANTING THE WRIT

I. The Court should grant certiorari to prevent Section 10(b) and Rule 10b-5 from being extended to disputes over the ownership of corporate securities.

This Court defined the principal parameters limiting Section 10(b) of the Securities Exchange Act of 1934 in *Blue Chip Stamps v. Manor Drugs*, 421 U.S. 723 (1975) and *Santa Fe Industries v. Green*, 430 U.S. 462 (1977).

In *Blue Chip Stamps*, this Court limited Section 10(b) and Rule 10b-5 to cases in which the plaintiff was a purchaser of stock. The Court excluded from Section 10(b) "those plaintiffs who were not themselves purchasers or sellers of the stock in question" because purchases and sales of stock "are generally matters which are verifiable by documentation, and do not

depend upon oral recollection . . . ." 421 U.S. at 742. The Court warned that any other rule "would throw open to the trier of fact many rather hazy issues of historical fact the proof of which depended almost entirely on oral testimony". 421 U.S. at 743.

In *Santa Fe*, this Court held that Section 10(b) and Rule 10b-5 do not reach alleged corporate misconduct which does not involve misrepresentations of fact related to the purchase or sale of a security. The Court based its opinion on the view that the federal securities laws were enacted to promote accurate disclosure of financial information related to the issuers of corporate securities, not to federalize disputes over matters traditionally governed by state law, such as alleged rights to the ownership or purchase of securities.

> "[A] private cause of action under the antifraud provisions of the Securities Exchange Act should not be implied where it is unnecessary to ensure the fulfillment of Congress' purposes, in . . . implementing a philosophy of full disclosure . . . ." 430 U.S. at 477-8 (internal quotations and citations omitted).

The Circuit Courts of Appeal have consistently followed this Court's teaching in *Blue Chip Stamps* and *Santa Fe* and refused to apply Section 10(b) or Rule 10b-5 to a plaintiff's claim of right to purchase securities. The Circuit Courts have limited Section 10(b) and Rule 10b-5 to cases involving misrepresentations of value relating to the issuance of corporate securities. In *Gurwara*, the Seventh Circuit dismissed a plaintiff's claim that defendant had misrepresented its intention to sell stock pursuant to an option because the misrepresentation "in no way related to the value of that stock". 937 F.2d at 382. In *Stanford*, the Ninth Circuit affirmed the dismissal of a plaintiff's Rule 10b-5 claim because it "revolve[d] . . . around the employer's alleged failure to honor the terms of [a] . . . contract [to sell securities]". 1990 WL 4659, at *1. In *Hunt*, the Fourth Circuit dismissed a Rule 10b-5 claim alleging that defendant had fraudulently refused to convey stock because

"[p]laintiff . . . has alleged no misrepresentation of the value of the stock . . . ." 852 F.2d at 787. In *Tully*, the Third Circuit denied standing to plaintiffs whose "allegations are based, not on injuries suffered as a result of plaintiffs' actual stock purchase, but rather on injuries caused by [defendant's] refusal to sell . . . ." 540 F.2d at 194. This Court has more recently reaffirmed its commitment to limiting the growth of the liability judicially created out of Section 10(b) in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (holding that federal courts should not imply aider and abetter liability).

The Tenth Circuit's decision conflicts with the decisions of the Third, Fourth, Seventh and Eleventh Circuits and this Court's decisions in *Blue Chip Stamps* and *Santa Fe* because the Panel permitted UIH to transform a state-law contract claim into a violation of Section 10(b) and Rule 10b-5. UIH makes no claim that defendants made any misrepresentation related to the value of Wharf Cable. In the words of Chief Justice Rehnquist in *Blue Chip Stamps*, UIH's claim raises no issue involving the Congressional policy of full and fair disclosure of facts material to the value of corporate securities. 421 U.S. at 728.

II. The Court should grant certiorari to prevent the imposition of liabilities under Section 10(b) and Rule 10b-5 where plaintiffs' only claim seeks damages for nonperformance of an alleged unenforceable oral option.

In *Blue Chip Stamps*, this Court limited the class of persons eligible to assert 10b-5 claims to those who had actually purchased corporate securities. The Court did so to avoid disputes which "turn largely on which oral version of a series of occurrences the jury may decide to credit". 421 U.S. at 742.

The federal courts have consistently applied *Blue Chip Stamps* to require that any 10b-5 plaintiff either have purchased corporate securities, or have had a right to purchase corporate

securities, enforceable under state law. As the Seventh Circuit said in *Kagan*, 907 F.2d at 691: "The principles animating [the statute of frauds] and the doctrine of *Blue Chip Stamps* alike require a conclusion that an unenforceable oral agreement is not a 'contract' to purchase or sell securities."; *see also Pelletier*, 863 F.2d at 1555-56. The Seventh and Eleventh Circuits properly recognized that permitting plaintiffs to press Rule 10b-5 actions based on oral claims of right to purchase securities would plunge the federal courts into the morass of conflicting oral testimony which this Court sought to avoid in *Blue Chip Stamps*, 421 U.S. at 742-43.

The plaintiffs in this case did not have an enforceable contract to purchase securities because their alleged oral option is barred by the Statute of Frauds, which renders oral contracts to buy securities unenforceable. Colo. Rev. Stat. § 4-8-319. In conflict with the Seventh and Eleventh Circuits and the opinion of this Court in *Blue Chip Stamps*, the Panel below converted plaintiffs' state law contract claim into a Rule 10b-5 action.

The Tenth Circuit committed three clear errors in its effort to circumvent the requirement that a Rule 10b-5 plaintiff must have a right to purchase securities enforceable under state law. *First*, the Panel construed the federal securities laws to apply by concluding that UIH's *allegation* that it had an oral option to purchase Wharf Cable common stock, itself, constituted a "security". The Panel thereby placed itself in conflict with the Seventh Circuit's opinion in *Kagan* and the Eleventh Circuit's opinion in *Pelletier*, both of which involved allegations of oral events which could as easily have been transformed into "securities" by the Tenth Circuit's alchemy. The Panel thereby also transgressed the limitations laid down by this Court in *Blue Chip Stamps* by allowing Wharf's 10b-5 liability to "turn . . . on which oral version of a series of occurrences . . ." the jury chose to credit. 421 U.S. at 742.

Second, in its eagerness to uphold the judgment, the Panel sought to avoid the fact that UIH's claim was clearly barred by the Statute of Frauds, Colo. Rev. Stat. § 4-8-319, which renders

alleged oral agreements to purchase securities unenforceable, by two blatantly indefensible arguments. The Panel first decided that the Statute did not apply because the oral option alleged by UIH was not a "security", as defined by the statute, and the Statute of Frauds, therefore, did not apply to oral options to purchase securities. In doing so, the Panel mistakenly applied the "security" requirement to *the oral option* alleged by UIH, rather than *the common stock* of Wharf Cable, which was plainly a "security" under the Statute of Frauds. By doing so, the Panel rendered Colo. Rev. Stat. § 4-8-319 inapplicable to the very class of agreements it was intended to render unenforceable, *i.e.*, oral agreements, including options, to acquire corporate securities.

Third, the Panel proceeded to excuse the district court's failure to give a jury instruction relating to the Statute of Frauds and partial performance, as required by the Colorado Supreme Court and the prior precedents of the Tenth Circuit (*see Lobato v. Bleidt* and *Nelson v. Elway, supra*), by ruling that the district court's giving of a boilerplate contract consideration instruction was sufficient. The findings required to avoid the Statute of Frauds are different from, and far more stringent than, those required to support a finding of contractual consideration. To avoid the Statute of Frauds, UIH would have had to prove that any alleged partial performance was: (1) substantial; (2) required by the oral contract and (3) fairly referable to no other theory besides that allegedly contained within the oral agreement. *Nelson v. Elway*, 908 P.2d at 108. There is no rational basis for the Panel's assertion that the district court's boilerplate contract consideration instruction, which asked only whether UIH had "promised any services", required the jury to make the factual determinations called for by the applicable Statute of Frauds instruction.

Had the Panel applied the applicable rules of law to this case, UIH's entire case would have been dismissed. The Statute of Frauds, of course, barred UIH's oral contract claims. UIH's failure to allege an option to purchase securities

enforceable under state law would have required dismissal of UIH's federal and state law securities claims under this Court's opinion in *Blue Chip Stamps* and the Circuit Court opinions in *Kagan* and *Pelletier*. UIH's remaining state-law tort claims would have been dismissed because UIH possessed no interest, the alleged deprivation of which would constitute a legally cognizable tort injury. *See, e.g., Pelletier, supra* at 1556: "The law is clear that an action for fraud may not be predicated on . . . an unenforceable contract." To the same effect, *see Gregg v. U.S. Industries, Inc.*, 715 F.2d 1522, 1531 (11th Cir. 1983); *Cohen v. Pullman Co.*, 243 F.2d 725, 728 (5th Cir. 1957); *Caplan v. Roberts*, 506 F.2d 1039, 1041-42 (9th Cir. 1974).

The Panel's refusal to apply the applicable rules of law has resulted in precisely the situation this Court attempted to avoid with its decision in *Blue Chip Stamps* — a massive Rule 10b-5 liability based exclusively on a single alleged oral statement. The $153,708,440 liability in this case turned, not largely, but exclusively, on "which oral version of a series of occurrences" the jury chose to credit. 421 U.S. at 742. I respectfully submit that the extraordinary lengths to which the Panel below was willing to go to sustain a judgment which was so clearly barred by the applicable rules of law constitutes a failure of the appellate process so egregious as to call out for this Court's review in exercise of its supervisory responsibilities over the federal appellate process.

III. The Court should grant certiorari to preserve the ability of parties involved in international business transactions to determine the law applicable to their relations.

In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) this Court recognized that the ability of parties to specify the law applicable to their relations is an "indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction". 417 U.S. at 516. The Panel's decision in this case undermines this "indispensable

precondition". By refusing to apply Hong Kong law, in accordance with the parties' clearly expressed intention and the overwhelming balance of contacts in this case, the Panel subjected a Hong Kong corporation to its jurisdiction to impose obligations which could not have been reasonably anticipated. As this Court once said: "[w]e cannot have trade and commerce in world markets . . . exclusively on our terms, governed by our laws, and resolved in our courts". *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). To saddle Wharf with a completely unforeseeable liability of $153,708,440 as the result of a single oral utterance in a case where the complaining party incurred a purely economic loss of no more than $900,000 is precisely the kind of result which this Court sought to avoid in *Bremen* and *Alberto-Culver*.

The facts related to the choice of law issue were not in dispute — five of the six parties are in Hong Kong (including one of the plaintiffs), virtually all the parties' discussions took place in Hong Kong, the proposed cable venture was to be located in Hong Kong, any services to be provided by the plaintiff were to be rendered in Hong Kong, and every document which addressed the choice of law question elected Hong Kong law—including the draft stock purchase agreement which the parties were negotiating.[4]

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[4] The draft shareholders' agreement which Wharf and UIH were negotiating in 1992 contained an express choice of Hong Kong law:

> This Agreement shall be governed by and construed in accordance with the laws of Hong Kong and the parties hereto hereby irrevocably submit to the non-exclusive jurisdiction of the Hong Kong courts. (P.App. Q-2; S-3; T-3; U-3.)

That draft shareholders' agreement was being negotiated at the very time when the oral option allegedly arose on October 8, 1992 and was to embody any binding agreement among Wharf, NYNEX and UIH. All drafts of that agreement throughout the period from September through November 1992 contained a Hong Kong choice of law provision. In addition, the parties' draft MOU's also contemplated their relations being governed by Hong Kong law (P.App. V-1; W-1), as did their Technical

Given these uncontroverted facts, the application of Hong Kong law was dictated both by the parties' intentions and by the "more significant relationship" test articulated in *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 783 (9th Cir. 1991). *See also Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1294-95 (1st Cir. 1988); Restatement (Second) of Conflict of Laws § 148.

In refusing to apply Hong Kong law, as required by applicable law and the parties' clearly expressed intentions, the Panel first ruled that no conflict of laws decision at all was required. The Panel said that no decision was necessary because there was no proven substantive difference between the securities laws of Hong Kong and those of the United States, (210 F.3d at 1223; P.App. B-18-20.) The Panel did so despite the fact that the district court's very subject matter jurisdiction under 28 U.S.C. § 1331 depended on proper resolution of the choice of law question and was, therefore, plainly outcome-determinative.

The Panel next proceeded to ignore the evidence conclusively establishing the applicability of Hong Kong law, by creating a new requirement that all choice-of-law elections must be grounded in a written, executed contract — a test which was obviously inapposite in this case where the plaintiffs' only claim is based on an alleged oral agreement.

The Panel's avoidance of the clearly applicable Hong Kong law thus rests on two completely indefensible legal arguments. First, Wharf's claim that the district court lacked "arising under" jurisdiction because no federal law applied should have been addressed by the district court at the outset of this litigation, whatever the substantive content of Hong Kong securities laws. Second, no court can reasonably condition recognizing the parties' choice of law decision on the presence of a written contract in a case where the plaintiffs' claim is, itself, based on an alleged oral statement. The Tenth Circuit's willingness to

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Cooperation Agreement (P.App. R-3).

indulge such indefensible arguments undermines the possibilities for order and certainty which this Court sought in *Alberto-Culver* and calls out for this Court's review.

IV. The Panel erred in holding that a district court which lacked subject matter jurisdiction under 28 U.S.C. § 1331 could nonetheless exercise supplemental jurisdiction over state law claims.

The Panel ruled that the district court was empowered to exercise supplemental jurisdiction over state law claims even if the court lacked subject matter jurisdiction and that lack of jurisdiction was obvious from the outset. In doing so, the Panel applied an unacceptably subjective test requiring a demonstration of "frivolousness". (210 F.3d at 1220; P.App. B-13.) The Panel thereby justified the exercise of supplemental jurisdiction despite the fact that plaintiffs' claim should have been thrown out at the outset on a motion to dismiss because it failed to allege a violation of Rule 10b-5, as a matter of law, in conflict with the decisions of the Sixth and Federal circuits. *Musson Theatrical, Inc. v. Federal Express Corp.*, 781 F.3d 1244, 1255 (6th Cir. 1996); *Textile Prods., Inc. v. Mead Corp.*, 134 F.3d 1481, 1486 (Fed. Cir. 1998).

V. The award of $58,500,000 in punitive damages and $67,000,000 in "compensatory" damages should be vacated because plaintiffs' only proven economic loss was $900,000 and the punitive damages award, which was more than 65 times plaintiffs' economic loss, violated the limitations of *BMW of North America v. Gore*, 517 U.S. 559 (1996).

Wharf seeks review of the largest punitive damages judgment ever awarded in the District of Colorado. The express punitive damages award of $58,500,000 dwarfs the punitive damages award reversed by this Court in *Gore*, both in terms of its absolute amount — the award in *Gore* was $2,000,000 — and in its relation to plaintiffs' economic loss of $900,000. Here, the award was 65 times UIH's economic loss;

in *Gore*, punitive damages were only 35 times the in-state economic damage. *See* 517 U.S. at 582 n.35.

The effective damage award in this case is, in fact, much larger. Because plaintiffs' proven economic loss in this case was no more than $900,000, the district court's $67,000,000 "compensatory" damage award was almost entirely punitive. Application of the *Gore* limitations, therefore, requires vacatur of both the $58,500,000 "punitive" damage award and the $67,000,000 "compensatory" damage award.

A. The Explicit Punitive Damage Award

The punitive damages award in this case satisfied none of the three criteria established in *Gore* to assess the reasonableness of a punitive damages award: (1) the ratio of punitive to actual damages; (2) the culpability of defendants' conduct; (3) the sanctions for comparable conduct. 517 U.S. at 575-85. The starting point for most analyses of the reasonableness of a punitive damage award is the relationship of that award to the loss caused by defendants' actions. In this case, the harm was purely economic. No questions of safety or public health are involved. The conduct complained of is unique to this case. There is no claim that Wharf engaged in any conduct similar to that alleged affecting any other party.

The only economic loss incurred by plaintiffs consisted of alleged reliance expenditures incurred by UIH to position itself as an attractive potential investor in the cable company being organized by Wharf, which efforts were valued at no more than $900,000 by plaintiffs.

A punitive damages award of $58,500,000 in a case involving a maximum of $900,000 in economic loss is *prima facie* unreasonable under *Gore*. The Panel below avoided addressing the unreasonableness by its uncritical acceptance of UIH's fraudulent assertion that they had established $67,000,000 in expected contract profits. That assertion is based on an undeniable misrepresentation which can be proven beyond reasonable doubt in this appeal.

Plaintiffs' only evidence in support of its $67,000,000 lost profits claim was the testimony of its expert, Mr. Jones. Mr. Jones' testimony consisted of a conventional discounted cash flow ("DCF") valuation of *the value of 10% of the common stock of Wharf Cable*. It was *not* a valuation of *the value of UIH's alleged oral option* to acquire 10% of the stock of Wharf Cable for $50,000,000±.

The Panel sought to avoid any reasoned analysis of UIH's misrepresentation by observing that Mr. Jones had deducted the cost of capital in valuing the stock of Wharf Cable. (210 F.3d at 1229; P.App. B-32.) That fact does not transform Mr. Jones' valuation of Wharf's common stock into a valuation of an option to acquire that stock for $50,000,000±. DCF analyses of the value of common stock routinely deduct all costs — current and capital — from all revenues in assessing a stock's value. Mr. Jones' analysis cannot, at the same time, be *both* an estimate of the value of 10% of the stock of Wharf Cable *and* an estimate of the value of an option to buy that stock for $50,000,000. It has to be one or the other. The option is worth $50,000,000 less than the stock.

The statement that Mr. Jones did not value UIH's alleged option is not an opinion. It is a fact. It is an undeniable fact. No reputable investment banker would give any credence to the argument advanced by the Panel below. Unless this Court acts, the federal judiciary will have left standing a judgment which imposes a completely unjustifiable penalty[5] which is well in excess of $100,000,000 and is based on a deliberate misrepresentation.

The Panel's affirmance of the punitive damage award should be reversed for another reason. In Colorado, the

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[5] Under Colorado law punitive damages cannot exceed compensatory damages, so elimination of the $50,000,000 exercise price will affect compensatory and punitive damages. *See* Colo. Rev. Stat. § 13-21-102(1)(a).

economic loss rule bars the assertion of tort claims where a plaintiff seeks to recast a breach of contract as a tort.

> "As a general rule, no cause of action lies in tort where purely economic damage is caused by a breach of a contractual duty." *Commercial Union Ins. Co. v. Roxborough Village Joint Venture*, 944 F. Supp 827, 831 (D. Colo. 1996) following the opinion of the Colorado Court of Appeals in *Jardel Enter., Inc. v. Triconsultants, Inc.*, 770 P.2d 1301, 1303 (Colo. Ct. App. 1988).

In Colorado, a plaintiff who seeks economic damages and complains of a defendant's alleged failure to perform a contractual duty may not assert a tort claim or recover punitive damages by recasting the breach of contract claim as a misrepresentation of intention to perform. UIH's complaint presents the quintessential economic loss claim. UIH seeks to recover an economic loss sustained as a result of Wharf's alleged misrepresentation of its intention to perform a contractual obligation. The award of punitive damages is, therefore, barred. The Panel below avoided the economic loss rule by becoming the only Court of Appeals ever to rule that the economic loss doctrine does not apply to intentional misrepresentations. In doing so, the Panel put itself in conflict with the Sixth, Seventh, Eighth and Eleventh Circuits, all of which have held that the economic loss doctrine applies to allegations of intentional, as well as negligent, misrepresentations. *Dinsmore Instrument Co. v. Bombardier, Inc.*, 199 F.3d 318, 320 (6th Cir. 1999); *AKA Distrib. Co. v. Whirlpool Corp.*, 137 F.3d 1083, 1086-7 (8th Cir. 1998); *Cooper Power Systems, Inc. v. Union Carbide Chemicals & Plastics Co., Inc.*, 123 F.3d 675, 682 (7th Cir. 1997); *Hoseline, Inc. v. U.S.A. Diversified Prods., Inc.*, 40 F.3d 1198, 1199-1200 (11th Cir. 1994); *Pelletier v. Stuart-James Co.*, 863 F.2d 1150 (11th Cir. 1989). In refusing to follow this consistent line of cases, the Panel once again demonstrated its willingness to suspend the applicable rules of law to affirm the unjustifiable result below.

Defendants' alleged conduct in this case bears none of the characteristics required by this Court in *Gore* to support an award of punitive damages. Wharf's alleged conduct did not "evince[ ]... indifference to or reckless disregard for the health and safety of others". 517 U.S. at 576. Wharf's conduct is unique to this case, not repetitive. *See* 517 U.S. at 577. Indeed, the sole act alleged is a single oral promissory utterance,[6] the very existence of which was hotly disputed and contradicted by the entire documentary history of the parties' relations. Even accepting plaintiffs' rendition of the facts, a punitive damages award of $58,500,000 cannot conceivably be justified on the basis of a single oral utterance alleged to have caused no more than $900,000 of economic loss to a single plaintiff.

The $58,500,000 punitive damages award is also unsupported by the sanctions imposed on the alleged conduct by statute. The maximum penalty is $2,500,000 under the federal securities law and $750,000 under the state securities laws and those penalties are rarely imposed, being reserved for cases of massive on-going fraud with multiple victims. *See* 15 U.S.C. § 78ff(a); Colo. Rev. Stat. §§ 11-51-603, 18-1-105. Here the alleged act did not even constitute conduct sanctionable under the securities laws, which are inapplicable to disputes over claims of right to purchase stock.

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[6] The Panel's assertion that Wharf's deliberate misrepresentations occurred repeatedly is unsupported by any citation to the record. (210 F.3d at 1232; P.App. B-37.) There is no evidence in the Record that Wharf at any time made any statement to UIH — oral or written — which repeated or acknowledged the alleged promise of October 8, 1992. To the contrary, all of the documentary evidence supports Wharf. Those documents reveal that the parties were negotiating a stock purchase agreement — not an option — and that no agreement was ever reached or executed. The fact that the Panel below would indulge itself in such a serious and demonstrably erroneous assertion without any record citation is further evidence of its unacceptable result-orientation.

In their concurring opinion in *Gore*, Justices Breyer, O'Connor and Souter focused on the appellate court's failure to apply meaningful legal rules of limitation on the award of punitive damages as an additional reason for vacating the punitive damages judgment. In this case, the failure of the Panel below to review the punitive damages judgment in this case in an informed and critical fashion amounts to an abdication of its responsibilities of appellate review which can now be remedied only by review by this Court.

B. The Implicit Punitive Damage Award

The actual punitive damage award in this case is in fact much greater than $58,500,000. Because the only evidence offered by plaintiffs to support the economic loss they allegedly sustained as a result of the deprivation of their alleged oral option was some $900,000 in reliance expenditures, almost all of the $67,000,000 "compensatory" damage award is, in fact, another punitive damage award.

Wharf has explained above the basis for its argument that plaintiffs failed to introduce any relevant evidence of its economic loss beyond $900,000 of alleged reliance expenditures. Wharf is aware that the presence of disputed issues of fact affecting resolution of reviewable legal questions is sometimes a reason for denying certiorari. In this case, the presence of such an issue is *an additional reason that certiorari should be granted.* It is such a reason because the fact that plaintiffs misrepresented their damage evidence is beyond reasonable doubt, because the misrepresentation was deliberate, because the consequent injustice — well over $100,000,000 in unjustifiable damages — is enormous, and because the obdurate refusal of the appellate Panel to address that misrepresentation constitutes an unacceptable failure of the federal appellate process.

CONCLUSION

Wharf asks that this Court grant this petition to review the decision of a Panel of the Tenth Circuit Court of Appeals

for the reasons stated above. Wharf respectfully submits that certiorari is warranted in this case because the opinion below has misconstrued Section 10(b) to federalize what should be a state law dispute over the ownership of securities; because the opinion constitutes an unjustifiable projection of United States securities laws into areas of international commerce in which they had no proper application; because the result below — a judgment for $153,708,440 based solely on a single alleged oral utterance and an economic loss of $900,000 — is so completely inconsistent with the applicable rules of law and unjust; and because the Panel's opinion is riddled with so many demonstrable errors, so many conflicts with other Courts of Appeal and so many questionable judgments, each of which resolved the complex issues here described — without exception and often without rational justification — against defendants.

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